JOHNSTONE ADAMS LLC

# EMPLOYMENT LAW UPDATE

## New Overtime Regulation Suspended: What Happens Now

Late in the afternoon of November 22, 2016, a Texas Federal District Court Judge granted a nationwide preliminary injunction enjoining the Department of Labor from implementing or enforcing the new white collar overtime regulation set to go into effect December 1. The regulation had been challenged by twenty-one (21) states. The preliminary injunction means that the current 2004 regulation remains in effect, for the time being, and salaried employees who meet the duties test of bona fide administrative, professional or executive employees and are paid a minimum of $455 in salary per week, (with no docking for partial day absences), are exempt from the overtime requirements of the Fair Labor Standards Act.

The Court stated that the preliminary injunction would "preserve the status quo while the Court determines the Department's authority to make the final rule as well as the final rules' validity." The Department of Labor now has the option of appealing the Court's grant of the preliminary injunction to the Fifth Circuit Court of Appeals. The losing party in that forum would then have the option to appeal to the U.S. Supreme Court.

Meanwhile, in the companion case filed by 54 business organizations, a motion for summary judgment to find the rule unenforceable remains pending. The motion has been fully briefed and could be ruled on in the next few weeks. If the court grants the plaintiffs' motion, the regulation would be permanently blocked subject to a reversal by an appellate court.

All of the legal uncertainty will extend well into January when a new administration will assume office, thus creating even more uncertainty. What are employers to do?

If an employer has made plans to comply with the new regulation, but has not announced or implemented any changes, it can simply sit on its plans and watch closely what happens with the regulation.

If an employer has announced changes, but not implemented them, it has the option of advising the employees that the effective date of the announced changes will be delayed due to legal proceedings that have affected the implementation and validity of the regulation.

If the employer has already announced and implemented changes, the situation is more difficult and creates employee relations issues. If an employee has already been "bumped up" to meet the new $47,500 minimum salary threshold, it will be hard to un-ring the bell and take the pay increase away. With Alabama being an employment-at-will state, an employer has the right to change the terms and conditions of employment, but the effect on employee morale of reversing a recent raise could be devastating on the work environment.

For those employees who met the administrative, professional or executive duties test but have already been reclassified to hourly non-exempt status because they fell below the increased minimum salary level, the employer now has the option of returning to the status quo, paying them their previous

regular salary (of $455 a week or more), from which no deductions are made for partial day absences, and avoiding the requirement of paying overtime. If the employees have already been changed to a clock-in status, the employer can continue to require them to clock-in, but must pay them a set salary and not hourly compensation based upon their clock time.

It remains to be seen whether the regulation will ultimately be upheld, rejected or eventually revised with a lower minimum salary threshold or a longer phase-in time to comply with an increased minimum salary. For the time being, the new regulation is off the table, and employers have no current burden to comply by the December 1 deadline.